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# IN THE SUPREME COURT
## OF THE
## UNITED STATES
October Term, 1983

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ELLEN SCHALL, As Commissioner of the New York City Department of Juvenile Justice,

Appellant

and

ROBERT ABRAMS, as Attorney General of the State of New York,

Intervenor-Appellant

against

GREGORY MARTIN, LUIS ROSARIO, KENNETH MORGAN, and all others similarly situated,

Appellees

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On Appeal From the United States Court of Appeals for the Second Circuit

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# AMICI CURIAE BRIEF IN SUPPORT OF APPELLEES ON BEHALF OF THE YOUTH LAW CENTER AND THE JUVENILE LAW CENTER OF PHILADELPHIA

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## AMICI CURIAE BRIEF IN SUPPORT OF APPELLEES ON BEHALF OF THE YOUTH LAW CENTER AND THE JUVENILE LAW CENTER OF PHILADELPHIA

## INTEREST OF AMICI CURIAE

The Youth Law Center is a public interest law firm, located in San Francisco, which was formed as a nonprofit corporation "to provide legal education, advice, counsel, representation, and general assistance in reform of the law regarding the rights of minors." During the past five years, Youth Law Center attorneys

have provided research, training and technical assistance to public officials, parents, and children's advocates in more than thirty states throughout the country, on issues such as conditions of juvenile confinement, incarceration of children in adult jails, inadequacies of mental health care, and rights of children and parents in foster care system. Youth Law Center attorneys have also represented abused and mistreated children in civil rights litigation in fourteen states.

The Juvenile Law Center of Philadelphia is a nonprofit law office committed to assisting children and youth through a program of legal representation and community education. This representation and education involves Juvenile Law Center attorneys in issues of delinquency, adoption assistance, mental health treatment, and foster care.

Attorneys at the Youth Law Center and the Juvenile Law Center in Philadelphia have investigated excessive detention practices in jurisdictions across the country and throughout the state of Pennsylvania. Both Centers currently represent children who are challenging punitive detention practices similar to those of the Appellants in this case.

This brief is being filed with the consent of all parties. Copies of the consent letters are on file with the Clerk of the U.S. Supreme Court.

## SUMMARY OF ARGUMENT

I. Due process challenges to juvenile court practices or procedures are evaluated by the standard of "fundamental fairness." In applying this standard, this Court considers the research, findings, and opinions of juvenile justice experts, particularly with respect to (1) the seriousness of the due process deprivation to the juveniles affected, and (2) the importance of the practice to the operation of the juvenile justice system.

II. Expert studies and reports demonstrate that, nationally, juvenile detention is excessive and inappropriate. Each year, large numbers of juveniles are detained in secure facilities. Juveniles are frequently detained for lengthy periods of time, though they are often charged with minor offenses. Detention of juveniles

is *not* related to any legitimate purpose of detention. Accordingly, practices such as those of Appellants, which result in excessive and unnecessary detention, have been criticized by drafters of model juvenile standards and other juvenile justice experts.

III. In addition to the general misuse of detention, juveniles are frequently detained in adult jails, under conditions which are abusive, dangerous and even life-threatening.

IV. Excessive secure detention is not necessary to the operation of the juvenile justice system, and an affirmance in this case does not mean that juveniles must be granted a right to bail. There are many alternatives to secure detention besides bail, including numerous types of community-based placements.

## ARGUMENT

### I. INTRODUCTION

"Fundamental fairness" is the standard this Court has used in each of its prior decisions involving due process challenges to juvenile court practices or procedures. *In re Gault*, 387 U.S. 1 (1967); *In re Winship*, 397 U.S. 358 (1970); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *Breed v. Jones*, 421 U.S. 519 (1975). In determining whether an accused juvenile is entitled to a particular due process protection, this Court has regularly considered the seriousness of the due process deprivation to the juvenile, and the importance of the practice to the operation of a distinctive and beneficial justice system for juveniles.

However, in applying this standard, this Court has never allowed the professed goals of the founders and supporters of the juvenile justice system blind it to the fact "that there is a gap between the originally benign conception of the system and its realities," *Breed v. Jones, supra*, 421 U.S. at 528. As this Court has noted, "There is evidence... that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." *In re Gault, supra*, 387 U.S. at 18 n.23, *quoting Kent v. United States*, 383 U.S. 541, 556 (1966).

As this Court has recognized, the label of juvenile delinquency is stigmatizing, *In re Gault, supra*, 387 U.S. at 24, *In re Winship, supra*, 397 U.S. at 367, and "[r]egardless of the purposes for which incarceration is imposed, the fact remains that it is incarceration." *Breed v. Jones, supra*, 421 U.S. at 530 n.12. Therefore, this Court has been extremely reluctant to find that a juvenile was not entitled to full due process protections. Only where it was found that a due process right "might well destroy the traditional character of juvenile proceedings," and that "other procedural rights... will give the juveniles sufficient protection," has this Court refused to extend adult due process protections to the juvenile justice system. *McKeiver v. Pennsylvania, supra*, 403 U.S. at 540.

The fact that any imposition of due process standards inherently reduces flexibility and discretion has never been ground for denial of such rights. To the contrary, "juvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *In re Gault, supra*, 387 U.S. at 18. Nothing more clearly demonstrates this point than the detention practices at issue in this case, which are typical of juvenile detention throughout the nation.

This brief discusses the numerous studies, reports and other research regarding juvenile detention practices developed by juvenile justice experts over the last 25 years. This Court has regularly relied on such information in its past cases to help assess the fundamental fairness of a juvenile court practice or procedure. *See, e.g., In re Gault, supra*, 387 U.S. at 12-30; *McKeiver v. Pennsylvania, supra*, 403 U.S. at 543-47; *Breed v. Jones, supra*, 421 U.S. at 530-31. These reports are important in evaluating both the impact of current practices on the juveniles detained, and the relative necessity of the practices to the operation of the juvenile courts. As this brief will demonstrate, the studies, reports and model standards prepared by juvenile justice experts overwhelmingly condemn the type of detention practices followed by Appellants in this case.

From these reports, several facts clearly emerge: (1) every year large numbers of juveniles are detained prior to adjudication in secure facilities; (2) most of those juveniles are charged with minor offenses or status offenses, and most are

released, like the petitioners in this case, at or before their adjudication hearings; (3) current juvenile detention practices are *not* related to any legitimate purpose of detention; (4) many juveniles are detained in adult jails under abominable conditions; and (5) the great majority of detained juveniles could be safely released to their families or to community-based programs, with no concomitant danger to the juveniles or to the public.

The studies and reports make it clear that, far from being an integral part of the juvenile justice system, current detention practices are arbitrary and seriously harmful to accused juveniles.

## II. PUNITIVE AND UNNECESSARY DETENTION OF JUVENILES OCCURS THROUGHOUT THE UNITED STATES

### A. *Large Numbers of Juveniles Are Detained Annually in Secure Facilities*

The United States Department of Justice, *Sourcebook of Criminal Justice Statistics — 1981* 457 (1981), reported that 11,508 juveniles were detained on the single survey day in 1979. In 1978, 392,000 juveniles were confined in secure juvenile detention centers and 480,000 juveniles were held in adult jails and lockups. Community Research Forum, University of Illinois, *An Assessment of the National Incidence of Juvenile Suicide in Adult Jails, Lockups, and Juvenile Detention Centers* 9 (U.S. Government Printing Office 1980). Others have estimated that as many as 1,000,000 juveniles are placed in secure confinement annually, and up to 15,000 are detained on any one day.[1/] As one commentator has observed, "[o]ver the years we have failed to notice, much less explain, the striking fact that short term detention/jailing has become America's primary 'correctional response' to arrested juveniles...." Lerman, "Discussion of 'Differential Selection of Juveniles for Detention' " 14 *J. Research in Crime and Delinquency* 166, 170 (July, 1977).

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[1/] *See, e.g.*, R. Sarri, *Under Lock and Key: Juveniles in Jails and Detention* (University of Michigan 1974); National Council on Crime and Delinquency, "Corrections in the United States," 13 *Crime and Delinquency* 1, 15 (1967).

B. *Juvenile Detention Is Often Inappropriate and Unnecessary*

There is widespread agreement that too many juveniles are unnecessarily and inappropriately detained in secure facilities. In 1968, the President's Commission on Law Enforcement and Administration of Justice stated that "[d]etention appears to be far too routinely and frequently used for juveniles...." President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 233-34 (1968). Unfortunately, this remains equally true today.

The U.S. General Accounting Office, in "Report to the Attorney General and the Secretary of Interior: Improved Federal Efforts Needed to Change Juvenile Detention Practices" (GAO/GGD 83-23, Mar. 22, 1983) [hereinafter GAO Report], recently concluded that questionable uses of secure detention remain common in the United States. The study used the FBI uniform crime reporting classification for serious and nonserious offenses and sampled detention practices in five states. The GAO Report found:

> In the five States we visited, ... between 22 and 51 percent of the detained juveniles in our sample were charged with non-serious offenses, status offenses, or no offense at all. Also, juveniles were held in secure detention for long periods of time.

*Id.* at 6. In one state "over 36 percent of the sampled juveniles ... were accused of status offenses or were not accused of any offense at all." *Id.* at 10. Further, "statistics supplied by one State showed that about 80 percent of the juveniles in detention centers in fiscal year 1980 had not been charged with a serious offense." *Id.* The report further found that "[f]emale juveniles in our sample were detained for reasons other than serious crimes in much higher proportion than male juveniles." [2/]

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2/ "State records also showed that females were detained for less serious reasons. For example, one State's statistics showed that about 91 percent of the detained females were charged with offenses other than serious crimes. One of

These findings are fully consistent with earlier reports and studies. For example, an article reviewing juvenile studies conducted during the 1960's concluded that: "... under any reasonable definition of 'dangerousness,' danger to the community is not the reason for holding the majority of the detained children...." Ferster, Snethen and Courtless, "Juvenile Detention: Protection, Prevention or Punishment," 38 *Fordham L. Rev.* 161, 168 (1969). The National Council on Crime and Delinquency, in "Corrections in the United States," 13 *Crime and Delinquency* 1 (1967), reported that in 1965, 409,218 juveniles were detained, but only 242,275 were committed or placed on probation following disposition.
Another study reported:

> When similar offenders are compared (same race, sex and number of prior referrals), juveniles who have been referred to court for juvenile offenses such as runaways and incorrigibility are *more* likely to be detained than are those accused of more serious violations.

Kramer and Steffensmeier, "The Differential Detention/Jailing of Juveniles: A Comparison of Detention and Non-Detention Courts," 5 *Pepperdine L. Rev.* 795, 799 (1978) (emphasis added).

C. *Juveniles Are Detained for Lengthy Periods of Times*

The problem is exacerbated by the fact that these detentions are often for long periods of time. In 1973, the U.S. Senate Subcommittee to Investigate Juvenile Delinquency determined that juveniles were detained an average of two weeks, and some were detained for months. *The Detention and Jailing of Juveniles: Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary*, 93d Cong., 1st Sess. 299 (1973). The GAO found that, "The 876 juveniles in

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the largest counties in another State predicted, on the basis of past practices, that 80 percent of its detained status offenders would be females." GAO Report at 10-11. The tendency of juvenile courts to detain disproportionate numbers of female teenagers for minor or nonoffenses has been frequently noted. *See, e.g.*, Pawlak, "Differential Selection of Juveniles for Detention," 14 *J. Research in Crime and Delinquency* 152, 162-63 (1977).

our sample were held in secure detention for periods ranging from a few hours to 612 days with 181 stays lasting over 30 days." GAO Report at 11. Another recent report, based upon data collected by the U.S. Census Bureau, found that in 1979, "the average length of detention stay ranged from 3 days in Arkansas to 33 days in South Carolina."[3/]

D. *Detention Practices Vary Greatly from State to State*

Further studies have found a remarkable disparity in the rates of detention from county to county and state to state. The National Council on Crime and Delinquency's survey of juvenile detention practices, prepared for the President's Commission on Law Enforcement and the Administration of Justice in 1966, concluded, "The use of detention differs so widely from county to county and state to state that whether a youngster will be detained is a matter of geographic accident." National Council on Crime and Delinquency, "Corrections in the United States," *supra*, at 27. Several research studies in the 1970's confirmed the substantial variations in juvenile detention.[4/] The most recent report demonstrates that substantial variations in detention continue unabated.[5/]

E. *Current Juvenile Detention Practices Are Not Related to Any Legitimate Purpose of Detention*

Many of these studies have attempted to correlate the variations

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3/ Krisberg, Litsky and Schwartz, *Youth in Confinement: Justice by Geography* 18 (Hubert H. Humphrey Institute of Public Affairs, University of Minnesota, 1982).

4/ Pappenfort, Kilpatrick, Morgan and Kirby, *A Census of Children's Residential Institutions in the United States, Puerto Rico and the Virgin Islands*, 7 vols. (School of Services Administration, University of Chicago, 1970); Poulin, Levitt, Young, Pappenfort, *Juveniles in Detention Centers and Jails: An Analysis of State Variations During the Mid-1970's* (1980); Kihm, "Prohibiting Secure Juvenile Detention: Assessing the Effectiveness of National Standards Detention Criteria," 31 *Juv. and Fam. Court J.* 3 (August, 1980).

5/ Krisberg, Litsky and Schwartz, *supra* note 3.

in secure detention with: (1) purported justifications for its use (*i.e.*, prevention of additional crimes or assuring attendance at court proceedings), or (2) legitimate jurisdictional differences (*e.g.*, more serious crime, higher arrest rates, urban/rural environment). After making these correlations, there is one thing upon which all of the independent research agrees, "in no case were these interjurisdictional differences explained away by differential rates of serious and violent youth crime."[6/]

One study compared urban and rural jurisdictions which used strict detention criteria and those which did not:

> Both the urban and rural jurisdictions [using] the criteria detained significantly fewer children than the comparison counties, even though the court referral populations were similar or even more serious in the counties [using] the criteria. There was *no significant difference* in the failure to appear rates for either the rural or urban jurisdictions. Total rearrest rates and felony rearrest rates were *similar or even lower* in both the rural and urban jurisdictions [using] the criteria.

Kihm, "Prohibiting Secure Juvenile Detention: Assessing the Effectiveness of National Standards Detention Criteria," 31 *Juv. and Fam. Court J.* 3, 12-13 (August, 1980) (emphasis added).

Many other factors were apparently much more significant in the decision to use secure detention, including the "get-tough" attitude of the judge,[7/] the number of secure detention beds

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6/ Pawlak, "Differential Selection of Juveniles for Detention," *supra* note 2; Law Enforcement Assistance Administration, *Pre-Adjudicatory Detention in Three Juvenile Courts: An Empirical Analysis of the Factors Related to Detention Decision Outcomes* (U.S. Gov't Printing Office 1975).

7/ In a survey of juvenile court judges conducted by the National Assessment of Juvenile Corrections, 49% of the judges responded that "placing a youth in detention is a good way to show him that the court means business." Sosin and Sarri, "Due Process — Reality or Myth," in *Brought to Justice? Juveniles, the Courts and the Law* 176-89 (R. Sarri and Y. Hassenfeld eds. 1976). *See also* Ferster, Snethen and Courtless, "Juvenile Detention: Protection, Prevention or Punishment?" 38 *Fordham L. Rev.* 161, 170-71 (1969); Mahan, "Ohio's Dictator Judge," *Columbus Monthly* (September, 1982).

available,[8] the availability of alternative placements,[9] the acceptability or availability of the parents as perceived by juvenile court personnel,[10] and the absence of 24-hour and weekend intake services.[11]

### F. *Studies, Reports, and Expert Commentaries Reject the Type of Punitive Detention Practices at Issue in This Case*

One of the factors this Court regularly considers in assessing the fundamental fairness of juvenile court practices or procedures is current thinking among juvenile justice experts as reflected in studies, model standards, and other reports.[12]

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8/ "When the data are separated into jurisdictions with a detention home and those without detention facilities, it is found that counties with a detention home detain juveniles with greater frequency than courts without a detention home .... Moreover, the frequency of detention is unrelated to the characteristics of the juvenile offender. For example, the data indicate that juveniles with similar characteristics have a higher probability of detention in courts with a detention home than in courts without a detention home. Kramer and Steffensmeier, "The Differential Detention/Jailing of Juveniles: A Comparison of Detention and Non-Detention Courts," 5 *Pepperdine L. Rev.* 795, 798-99 (1978). *See also* Pawlak, "Differential Selection of Juveniles," *supra* note 2, at 154-57.

9/ Rosenheim, "Detention Facilities and Temporary Shelters," in *Child Caring: Social Policy and the Institution* 253, 266-69 (Pappenfort, et al., eds. 1973); Sarri, *Under Lock and Key: Juveniles in Jails and Detention*, *supra* note 1.

10/ Law Enforcement Assistance Administration, *Pre-Adjudicatory Detention in Three Juvenile Courts: An Empirical Analysis of the Factors Related to Detention Decision Outcomes*, *supra*. "Obviously, youth who have no home or whose parents refuse to accept them run the highest risk of detention regardless of what they have or have not done." Sarri, "Service Technologies: Diversion, Probation and Detention," in *Brought to Justice? Juveniles, the Courts and the Law* 151, 167 (R. Sarri and Y. Hassenfeld eds. 1976).

11/ Wald, "Pretrial Detention of Juveniles," in *Pursuing Justice for the Child* 119, 121, 127 (1976); R. Sarri, *Under Lock and Key: Juveniles in Jails and Detention*, *supra*, at 71; Ferster and Courtless, "Juvenile Detention in a Affluent County," 6 *Fam. L. Q.* 3, 29 (1972).

12/ *E.g.*, *In re Gault*, *supra*, 387 U.S. at 12-30; *McKeiver v. Pennsylvania*, *supra*, 403 U.S. at 543-47.

As a result of these studies and findings, juvenile justice experts and drafters of model standards have sharply criticized the vagueness which characterizes juvenile detention statutes such as New York's.[13/] The specifics of the model juvenile justice standards will be discussed more fully by other *amicus*,[14/] but it is important to recognize that virtually all of the juvenile studies and standards cited in this brief recommend carefully tailored restrictions on the currently unbridled discretion of juvenile court judges to order secure detention.

Requiring states such as New York to revise their juvenile detention statutes to avoid the arbitrariness which currently plagues the system would in no way "compel states to abandon or displace any of the substantive benefits of the juvenile process," *In re Gault*, *supra*, 387 U.S. at 21, as suggested by Amici Attorneys General.[15/] To the contrary, current detention practices have done much to undermine the credibility of the juvenile courts and divert needed resources from the primary task of rehabilitating serious juvenile offenders.

As stated in the introduction to Institute of Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Interim Status: The Release, Control, and Detention of Accused Juvenile Offenders Between Arrest and Disposition* 1-3 (1980) (footnotes omitted):

> The detention of juveniles prior to adjudication or disposition of their cases represents one of the most serious problems in the administration of juvenile justice. The problem is characterized by the very large number of juveniles incarcerated during this stage annually, the harsh conditions under which they are held, the high costs of such detention,

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13/ Amici Attorneys General argue that many model statutes, standards or general commentaries support some form of preventive detention for juveniles. However, Amici Attorneys General never even attempt to connect this general proposition with the specific questions presented by this case. In fact, most model standards emphatically reject vague, discretionary detention statutes such as New York's.

14/ *See* Amicus Curiae brief of the American Bar Association.

15/ Brief of Amici Attorneys General, p. 20.

and the harmful after-effects detention produces.

> In contrast to the pretrial stage, much greater care and sensitivity is usually devoted to the postadjudicative disposition, its facilities and its alternatives to incarceration. The result, paradoxically, is considerably less detention under better conditions once the juvenile justice system ceases to presume that the juvenile is innocent.
>
> This volume proceeds on the premise that the danger of too much detention before trial or disposition currently outweighs the danger — both for juveniles and society — of too much release.

The standards adopted by the Institute of Judicial Administration and the American Bar Association, as well as those proposed by the National Advisory Committee on Criminal Justice, *see* National Advisory Committee on Criminal Justice Standards and Goals, *Report of the Task Force on Juvenile Justice and Delinquency Prevention* (1976), severely curtail the broad discretion to detain which has led to so many abuses over so many years. Research has revealed that if the standards are implemented, "... potentially more than half of the estimated one million children annually detained could be safely released to supervised non-secure settings." Kihm, "Prohibiting Secure Juvenile Detention: Assessing the Effectiveness of National Standards Detention Criteria," *supra*, at 16.

### G. *Detention in Other States Is Similar to That in New York*

In the wake of the lower court decisions in this matter, children's advocates outside of New York began examining detention practices in other jurisdictions. Amici herein have investigated detention practices in the Second District Juvenile Court in Utah (Salt Lake City) and in the State of Pennsylvania.

#### 1. *Detention in Utah*

In late 1979, the Utah Division of Youth Corrections prepared

a report to a state legislative committee regarding detention of juveniles at the Salt Lake County Detention Facility. Utah Division of Youth Corrections, *Response to Request by Social Services Interim Study Committee For Additional Data Concerning Salt Lake County Detention Utilization* (Dec. 12, 1979). The report indicates that between January and June, 1979, only 4.9% of the juveniles brought before the juvenile court ultimately received a secure commitment, either to the Youth Development Center (state training school), the state hospital, or to detention. *Id.* at 21. Put another way, the report indicates that 95.1% of the juveniles detained at the Salt Lake facility had their charges dismissed or were released to nonsecure placements at or before their dispositional hearings. This is a substantially higher percentage than in the case before this Court, where the Court of Appeals noted that in New York City between 50% and 70% of juveniles detained were released at or before disposition. *Martin v. Strasburg*, 689 F. 2d 365, 369 n.18 (2d Cir. 1982).

A more comprehensive report on detention in Salt Lake County in 1979 was prepared by the National Council on Crime and Delinquency, using data supplied by the Utah Second District Juvenile Court. National Council on Crime and Delinquency Research Center, *Utah Second District Juvenile Court Study, Vol. I: A Process Study of Juvenile Court Intake, Detention, Disposition, and Probation Services* (1979). Two findings of that report are particularly relevant to the instant case. First, the report found that 38.8% of the youth for whom no petition was ever filed were nevertheless held in secure detention. *Id.* at 35. The report states:

> This is an important finding. Admission to detention should be reserved for those cases where there is a high probability of petition filing. A considerable body of opinion suggests that youth should not be admitted to detention unless there is a high probability that the youth may be sent to an institution. This data further underscores the need for more restrictive detention criteria and very careful monitoring of detention center practices to ensure detention is reserved for those youth likely to remain under the court's jurisdiction.

*Id.* Second, the report indicates that for all of 1979, only 10% of

the juveniles detained were ultimately committed to a secure facility; 90% of the juveniles detained had their charges dismissed or were released to nonsecure placements. *Id.* at 53 (Table 3-7).

The above data indicate that juvenile court detention practices in Salt Lake County are as unnecessary and punitive as those in New York City. Nine out of ten of the juveniles locked up in the Salt Lake County facility are detained "not for preventive purposes, but to impose punishment for unadjudicated criminal acts." *Martin v. Strasburg*, *supra*, 689 F. 2d at 372.

2. *Detention in Pennsylvania*

New York state's statutory scheme authorizing the detention of allegedly delinquent children for crime prevention purposes parallels sections of Pennsylvania's Juvenile Act, 42 Pa. C.S. §§6325, 6331 and 6341, which provide for pretrial detention to "protect the person or the property of others or of the child." While this language differs slightly from New York's preventive detention statute, the intent, purpose and results are identical.

The detention practices in New York state described by the lower courts in this case are duplicated in Pennsylvania. New York's statutory scheme yielded the paradoxical result that "the vast majority of juveniles considered sufficiently dangerous by the Family Court to justify pretrial incarceration ... are in fact released by prosecutors or by the Family Court within days or weeks." *Martin v. Strasburg*, *supra*, 689 F. 2d at 369. In Pennsylvania, the majority of those detained are also released. Moreover, for those juveniles who are placed by the court at the disposition hearing, nearly all are sent to nonsecure facilities: less than 3% of the children charged with offenses in Pennsylvania are sentenced to a secure institution, although over 20% statewide are detained in secure facilities prior to adjudication. Juvenile Court Judge's Commission, *Pennsylvania Juvenile Court Dispositions* Tables B, 13 and 15 (1982). Furthermore, as in New York, the great majority of children who are detained under Pennsylvania's Juvenile Act are not serious or violent offenders.[16/]

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16/ Only 17% of those detained in Pennsylvania in 1982 were charged with rape, robbery, arson, or aggravated assault. (Murder is not considered a juvenile offense in Pennsylvania.) *Pennsylvania Juvenile Court Dispositions*, *supra*, Table 14.

## III. PUNITIVE AND UNNECESSARY DETENTION OF JUVENILES ALSO OCCURS IN ADULT JAILS THROUGHOUT THE UNITED STATES, UNDER CONDITIONS WHICH ARE ABUSIVE AND LIFE-THREATENING

### A. *The Scope of the Problem and the Federal Response*

In her landmark study in 1974, Dr. Rosemary Sarri of the University of Michigan estimated that approximately 500,000 juveniles were detained in adult jails each year. R. Sarri, *Under Lock and Key: Juveniles in Jails and Detention*, *supra* note 1, at 5. A more recent study by the Community Research Forum of the University of Illinois reports that in 1979 an estimated 479,000 children were held in adult jails and lockups. Community Research Forum, *An Assessment of the National Incidence of Juvenile Suicide in Adult Jails, Lockups and Juvenile Detention Centers*, *supra*, at 9. In that year, the California Youth Authority reported that at least 114,166 children were held under the age of 13, and 1,000 were under the age of 9. California Department of the Youth Authority, *Minors Held in California Jails and Lockups During 1979*, at 13, 16 (1981).

During the early 1970's, the problem of children in adult jails attracted the concern of Congress. The Senate Subcommittee to Investigate Juvenile Delinquency held hearings on the problem in 1972 and 1973. Senator Bayh, chairman of the Subcommittee, described the problem:

> The enormity of the problems of juvenile detention is staggering. On any given day, there are close to 8,000 juveniles held in jails in the United States. It is estimated that more than 100,000 youths spend one or more days each year in adult jails or police lock-ups. In addition, the average daily population in juvenile detention facilities is over 12,000, with close to 500,000 held annually in such facilities. We intend to consider in these hearings not only the conditions of such jailing and detention but whether this amount of incarceration is necessary.
>
> Our first two days of hearings will focus on the problems

> presented by juveniles in jails. In many jails, contrary to most recommended standards, and often contrary to state law, juveniles are not separated from adults. Tossed in jails with hardened criminals, a runaway may learn how to steal a car or a truant may be taught how to shut off a burglar alarm. Innocent teenagers emerge from jail street-wise. Even a brief stay in jail, rather than deterring crime, may just make a juvenile more sophisticated and less likely to be caught at his next offense. Whether or not the juvenile learns actual criminal skills, young people may often be held weeks or longer in jails lacking adequate medical services and ill-equipped to provide educational or rehabilitative programs for youth.

*The Detention and Jailing of Juveniles: Hearings on S.Res. 56, Section 12 Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, supra.*

The Congressional hearings resulted in passage of the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §§5601 *et seq.*, which provides funds to the states to support juvenile justice system reforms. The heart of the Act is the requirement that in order to receive funding, states must develop plans to insure that (1) status offenders will be removed from secure detention, and (2) juveniles will be removed from adult jails where they may have sight or sound contact with adult inmates. 42 U.S.C. §5633(a)(12), (13), (14). Since 1974, the Office of Juvenile Justice and Delinquency Prevention, which implements the Act, has provided funding to support state efforts, technical assistance, research, and demonstration projects.

The problem of jail incarceration of children, however, has in many ways proven resistant to federal and state reform efforts. Children continue to be jailed for minor offenses, under conditions which are abusive and life-threatening.

### B. *Over-Detention of Children in Adult Jails*

In a 1976 study, the Children's Defense Fund reported that only 11.7% of the juveniles held in adult jails were charged with dangerous acts. The rest were charged with property crimes or minor offenses, and of these, 17.9% were in jail for status offenses

and 4.3% were not charged with any offense at all. Children's Defense Fund, *Children in Adult Jails* 3-4, 19-20 (1976). Investigations of individual jails confirm that incarceration of children for minor offenses is common. A 1974 study of Colorado jails reported on detention practices in the Mesa County Jail in Grand Junction:

> During the first six months of 1974, the period on which this report concentrated, 449 juveniles were detained, approximately 38% of whom were held for unexplained "probation violations." Thefts were the next highest category of detainees, 44 juveniles or only about 10% of the total. Because of the increase in alleged "probation violations" during the school year and because of comments received from various youth-serving professionals in the county, it is believed that many of the probation violations resulting in closed detention are for truancy, class disruption, smoking on school grounds, etc. It is impossible to reach any conclusion but that as many as 30% of the detentions are illegal and imposed as a result of a punitive philosophy on the part of probation officers and possibly school personnel .... Indeed, the detention supervisor himself stated that in his opinion, at least 50% of the juveniles need only counseling and/or open placement, including 75% of the girls who are presently placed in closed detention.

Hufnagel, *Statewide Plan for the Provision of Detention, Shelters and Detention Services*, 192-93 (Colorado Division of Youth Services 1974) [hereafter, Hufnagel Report].

A similar situation occurred in Lawrence County, Ohio, where the local juvenile court judge ordered young children held in the county jail for truancy, running away from home, and being unruly. Taylor, "Justice for Children: A Jail Cell?" *Los Angeles Times*, Feb. 21, 1982, at 1. Almost 500 children were held in the jail in a three-year period, including 100 who were 14 years old or *younger* and 100 who had committed only status offenses, acts like truancy which would not be crimes if committed by adults. Maher, "Ohio's Dictator Judge," *Columbus Monthly* (September, 1982). For example, the judge routinely sentenced children to one day in jail for each day of unexcused absence from

school. *Id.*

Punitive detention of children in jails occurs throughout the country. In Boise, Idaho, for example, children have been held in the county jail for possession of tobacco or alcohol, and for failure to pay traffic fines.[17] Schmidt, "When 'Legal Inconsistency' Led to Tragedy," *The New York Times*, Aug. 1, 1982.

### C. *The Conditions in Jails Are Abusive and Life-Threatening for Juveniles*

The lower federal courts have recognized the dangers to juveniles from incarceration in adult jails. In *Baker v. Hamilton*, 345 F. Supp. 345 (W.D. Ky. 1972), the court found that confinement of juveniles in the Jefferson County Jail constituted cruel and unusual punishment, in view of the "cramped quarters, poor illumination, bad circulation of air, broken locks, no outdoor exercise or recreation, and no attempt at rehabilitation, in addition to the condition of the 'hole,' which Judge Thompson described as horrible." *Id.* at 353.

In *Swansey v. Elrod*, 386 F. Supp. 1138 (N.D. Ill. 1975), the

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[17] In *Cox v. Turley*, 506 F. 2d 1347 (6th Cir. 1974), the Court of Appeals found that incarceration of the plaintiff for five days in the adult jail in Madison County, Kentucky, violated the child's constitutional rights. The events which led to the incarceration are a graphic example of the arbitrary and punitive nature of jail detention of children:

> Duane Cox, a boy 16 years old, was walking down the street in the town of Richmond in Madison County, Kentucky, on a summer evening, Saturday, August 12, 1972. He was doing nothing to attract attention and apparently, was only visiting the town in the county in which his cousin lived, adjoining the one in which he lived with his parents. A police officer arrested the boy for violation of the curfew law, took him to the Madison County jail and lodged him there on the verbal telephoned orders of defendant, Robert Turley, a non-lawyer judge, in charge of juvenile affairs, as is the established custom of the defendants. When the boy was taken to the jail, he asked for the right to telephone his father, to tell him where he was, and of the need for his help. This request of the boy was abruptly refused. The boy was then lodged with the jailer of the Madison County jail. There was no hearing of any kind before the boy was turned over to the jailer.

*Id.* at 1349.

court ordered the transfer of the plaintiff juveniles out of the Cook County Jail, where they were subjected to serious overcrowding, close contact with adult inmates, inadequate diet, inadequate educational program, and a total absence of recreation or rehabilitative treatment. *Id.* at 1141. The court relied in part on the testinomy of an expert witness, who stated that incarceration in the jail constituted a " 'devastating, overwhelming, emotional trauma....' " *Id.*

In the most recent decision by a federal court on this issue, *D.B. v. Tewksbury*, 545 F. Supp. 896 (D. Ore. 1982), the court noted both the punitive nature of detention and the abusive conditions of confinement at the Columbia County Correctional Facility (CCCF), an adult jail in St. Helens, Oregon. Of 101 children held at the jail during a nine-month period in 1980, for example, 36 were held on status offense charges. *Id.* at 898. Moreover,

> ... status offenders ordinarily are confined *longer* than those detained for criminal acts. In any event, 70 percent of the children who were confined in CCCF in 1981 were released within 24 hours. Nearly 75 percent of the children held in CCCF are released to their parents. A small number pose an immediate threat to community safety or their own safety or may flee from the court's jurisdiction. In 1980, of 124 children confined in CCCF during a nine-month period, only 25 required secure custody. The others could have been released without posing a serious threat to community safety, personal safety, or court jurisdiction.

*Id.* (emphasis added)

The court found the conditions of confinement appalling. Children were placed in cells without regard to their ages, levels of maturity, or the reasons for their incarceration. There was no adequate training of corrections staff, nor adequate supervision of the children during their periods of incarceration. There was no programming, no provision for exercise or recreation, no educational program, no provision of medical or psychological services, and no written policies pertaining to the care and treatment of incarcerated juveniles. Female juveniles were required to strike a cell door or to yell for assistance in order to receive sanitary napkins. No children were allowed to have

underwear at any time. *Id.* at 898-902. The court concluded:

> CCCF is designed for the purpose of confinement, without regard for human dignity or need. Nothing over and above the basic minimums necessary for the maintenance of bodily functions is provided to children at CCCF. Nothing at CCCF is responsive to the emotional and physical needs of children in conflict with the law and their families. CCCF is a maximum security lock-up facility.
>
> * * * *
>
> Confinement in CCCF is clearly and fundamentally intended to punish children. Punishment is the treatment of choice of Columbia County's Juvenile Department for its detained children. This "treatment" has little or nothing to do with simple detention, rehabilitation, or even the protection of society.

*Id.* at 903-04. Accordingly, the court found that incarceration of children in adult jails is fundamentally unfair, and a denial of due process rights under the Fourteenth Amendment. *Id.* at 906-07.[18/]

The abusive conditions in adult jails have led to tragedies for detained children throughout the country. One 16-year-old boy hanged himself in his cell in the jail in Lawrence County, Ohio, after his mother had fruitlessly warned jailers that her son would attempt suicide. Three years later, a 15-year-old girl, incarcerated in the jail after she briefly ran away from home and voluntarily returned, was sexually assaulted by a deputy jailer. *Los Angeles*

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18/ The 1974 study of Colorado jails reported the following regarding the jail in Grand Junction:

> The principal researcher made two visits to the "juvenile detention center" as it is euphemistically called. During the first visit, the researcher was appalled by the filth of the facility — walls were covered with graffiti, floors were covered with dust, candy wrappers, etc., and the mattresses on which the children sleep were in a deplorable condition. As of the second visit, the walls had been painted and minimal maintenance had been performed.

Hufnagel Report, at 191.

*Times*, Feb. 21, 1982, p. 1. In the Boise, Idaho, jail one 17-year-old boy, Christopher Peterman, locked up for neglecting to pay $73 in traffic fines, was tortured by other jail inmates over a 14-hour period and eventually beaten to death. William E. Schmidt, "When 'Legal Inconsistency' Led to Tragedy," *The New York Times*, Aug. 1, 1982. Children in several states, overwhelmed by the isolation and loneliness of detention in an adult jail, have committed suicide. *See, e.g.*, "Family Testifies About Oldham Boy's Suicide," *The Louisville Times*, Feb. 1983, p. A-8.

Indeed, a major study, sponsored by the U.S. Department of Justice, concluded that the suicide rate of juveniles in adult jails is almost eight times larger than that of juveniles in juvenile detention centers. Community Research Forum, University of Illinois, *Assessment of the National Incidence of Juvenile Suicide in Adult Jails, Lockups, and Juvenile Detention Centers*, *supra*, at 10.

### D. *Abusive Detention of Children in Adult Jails Continues To Be a Problem*

In its recent report on juvenile detention practices, the Government Accounting Office stated:

> None of the 22 jails we visited provided all the physical conditions and services recommended by national standards for juveniles. Several jailers and sheriffs said they did not want to hold juveniles and were not equipped to do so.

GAO Report, at 16. More specifically, the GAO Report noted that juveniles were regularly subjected to substandard conditions:

> Although the physical conditions and services provided in jails varied by locality, in all jails medical, dental and educational services were non-existent or limited. Most jails did not provide for educational assessments or medical exams but did have agreements with local doctors, dentists and hospitals for emergency care.
>
> None of the jails provided educational programs for juveniles other than voluntary graduate equivalency diploma

> programs. No efforts were made to coordinate with the juveniles' local school systems or evaluate their educational needs. Similarly, none of the jails was equipped to provide adequate recreation for juveniles.
>
> Available information showed that juvenile cells at 12 jails did not include the minimum 60 square feet per juvenile recommended by NAC standards. For example, at one facility the three cells used were each about 60 square feet in size and contained four bunks. Other physical conditions also did not meet the standards. Substandard conditions included dim lighting, lack of ready access to toilet or wash basin, and lack of varied diet.

*Id.* at 17. Additionally, the GAO Report found sight and sound separation, required by the Juvenile Justice and Delinquency Prevention Act, to be inadequate. *Id.* at 17. The report also documented the isolation practices used in some adult jails to separate children from adults.

> In another state, isolation-type cells were used for juveniles at three of the five jails we visited. Also, these juveniles remained in their cells, which local officials in one jail called "dungeons" and "more severe" than adult cells, 24 hours per day.

*Id.* at 20.

If this Court legitimizes the kind of unnecessary and primitive detention demonstrated in New York, it will also sanction the continued punitive detention of children in adult jails under abusive and life-threatening conditions. Nothing could more clearly condemn the children of this country to " 'the worst of both worlds.' " *In re Gault, supra*, 387 U.S. at 18 n.23 (1967).

## IV. THERE ARE MANY ALTERNATIVES TO SECURE DETENTION OTHER THAN BAIL

Amici Attorneys General and Texas District and County Attorneys assume that bail is the only alternative to the punitive preventive detention to which appellees are subjected. They then

argue from that assumption that imposition of a bail procedure would be inconsistent with the purposes and functions of the juvenile justice system. They conclude that, since the only alternative to punitive detention is inappropriate, the detention practices of appellants must be preserved. [Attorneys General Amici brief, pp. 3, 22-24; Texas brief, pp. 10-13.]

Amici's argument is both erroneous and irrelevant, for two reasons. First, there are many alternatives to secure detention other than bail. Indeed, many of these alternatives are already in use in amici's own states. Second, these alternatives to secure detention further the purposes and functions of the juvenile justice system, rather than hindering them.

This case has nothing to do with bail. Model standards which substantially restrict the discretion to detain, also oppose the use of bail for juveniles. Institute of Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Interim Status*, *supra*, at 63; *Report of the Task Force on Juvenile Justice and Delinquency Prevention*, *supra*, at 404. The problem of punitive preventive detention arises in jurisdictions throughout the country because appropriate alternatives are not adequately developed and utilized by juvenile justice officials and detention personnel.

This issue was discussed in the recent General Accounting Office report on federal efforts to change juvenile detention practices, in a section entitled, "Additional Alternatives Needed to Reduce Secure Detentions." The report noted the successful use of alternatives to secure detention:

> Many programs for juveniles have reported that they successfully served as alternatives to secure detention. University of Chicago researchers recently studied 14 local alternative programs for OJJDP and reached several significant conclusions that provide a perspective of the alternatives issues. The study concluded that:
>
> —Upwards of 90 percent of the juveniles in alternative programs did not commit new offenses or run away.
>
> —Various program formats were about equally successful in keeping juveniles out of trouble and available to the courts.

> —Residential programs, such as group homes and foster homes, were successful for both delinquents and status offenders.

GAO Report at 29. The GAO Report concluded: "Providing additional alternatives could help alleviate the problem of questionable detentions." *Id.* The report stated, further, that alternative programs must be integrated into the total juvenile justice systems to be effective:

> [T]o be highly effective these alternatives must be
>
> —used in conjunction with specific detention criteria;
>
> —properly planned, which includes identifying the type, location, and capacity of each alternative; and
>
> —properly coordinated with local detention decision makers.

*Id.*

Perhaps the best recent summary of the type of alternative programs, with examples of each type, appears in a publication by the National Council on Crime and Delinquency, M. Woods, *Alternatives to Imprisoning Young Offenders: Noteworthy Programs* (National Council on Crime and Delinquency 1982). Residential programs include foster family care, group homes, highly structured group care, and secure group facilities. Non-residential programs include job and career programs, afterschool or evening programs, alternative schools, "advocacy" programs, counseling, mediation and arbitration programs, and intensive services to families. *Id.* at 4-6. The report provides descriptions of dozens of "model" alternative programs across the country, including several in New York.

There have been extensive reports on alternatives to secure detention in the juvenile justice literature for at least ten years. *E.g.*, National Institute of Law Enforcement and Criminal Justice, *New Approaches to Diversion and Treatment of Juvenile Offenders* (U.S. Department of Justice 1973); Office of Technology Transfer, *Diversion Project: Urbana and*

*Champaign, Illinois* (U.S. Department of Justice 1977); National Office for Social Responsibility, *Diversion of Youth from the Juvenile Justice System: Project Orientation Resource Handbook* (1978); L. Ladd and M. Lynch, *Building Support for Juvenile Diversion: A Case Study of the Memphis-Metro Youth Diversion System* (U.S. Department of Justice 1979); T. Palmer and R. Lewis, *An Evaluation of Juvenile Diversion* (1980); F. Dunford, D. Osgood, and H. Weichselbaum, *National Evaluation of Diversion Projects: Executive Summary* (U.S. Department of Justice 1982). In fact, the New York State Division for Youth published its own report on types of alternative placements, *Alternative to Secure Detention Handbook*, with descriptions of residential programs (including foster homes, volunteer foster homes, proctor programs, runaway homes, agency-operated boarding homes, group homes, and "structured" group residences) and nonresidential programs (family court community aide programs, evening report centers, day treatment centers, and family crisis intervention). Thus, it is not that alternatives to secure detention are unknown or unavailable; rather, such alternatives have not been adequately developed and utilized by juvenile decisionmakers. *See* Austin and Krisberg, "The Unmet Promise of Alternatives to Incarceration," 24 *Crime and Delinquency* 374 (1982).

## CONCLUSION

For these reasons, the decision below should be affirmed.

Respectfully submitted,

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